II. A statute provides fair notice of its plain meaning and does not require a case on point.

A particularly disturbing aspect of the Court of Appeals' opinion in the present case is its cavalier treatment of the Pennsylvania statute at issue. The considered policy decision of the elected representatives of the people of Pennsylvania is entitled to more respect.

The Court of Appeals began by stating the test of "fair notice." See *Bronshtein* v. *Horn*, 404 F. 3d 700, 707 (CA3 2005); App. to Pet. for Cert. 12a-13a. The Court of Appeals then notes that the statute was enacted before the time of Bronshtein's default and plainly bars his claim. See *id.*, at 14a-15a. Yet the plain wording of the statute is not enough, because "strict enforcement of the provision did not begin immediately." *Id.*, at 15a.

The justification for this statement consists of a line of Pennsylvania cases beginning long before the statute, in which the Pennsylvania Supreme Court in capital cases waived the usual rule on failure to preserve claims. See *ibid.* (citing *Commonwealth* v. *McKenna*, 476 Pa. 428, 383 A. 2d 174 (1978)). The Court of Appeals quotes its own summary of this line of cases, saying, "*McKenna*, for a time 'finally established that a claim of constitutional error in a capital case would not be waived by a failure to preserve it.' " *Ibid.* (quoting *Szuchon* v. *Lehman*, 273 F. 3d 299, 326 (CA3 2001)).

However, *McKenna* did not involve this statute or any other statute. The default rule at issue had been shaped through the years in case law. See *McKenna*, 476 Pa., at 437-438, 383 A. 2d, at 179-180 (history of rule and exceptions). The decision of the *McKenna* court to make an exception to the *judicially* crafted waiver rule was based on its own assessment of competing considerations of policy. See *id.*, at 441, 383 A. 2d, at 181.

These kinds of judicial policy choices, not grounded in the Constitution, are always subject to being overturned by the

legislative branch. See, *e.g.*, *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996) (judicially created limits on federal habeas further tightened by Congress). The Pennsylvania Legislature similarly tightened the standards for collateral review in that state at about the same time and for the same reason.

Pennsylvania's statute of limitations for collateral review, 42 Pa. C. S. § 9545(b), was enacted November 17, 1995, and took effect 60 days later. See *Commonwealth* v. *Peterkin*, 554 Pa. 547, 554, 722 A. 2d 638, 641 (1998). The act provided one year from enactment for initial petitions in cases that became final before the act. See *ibid.* The Pennsylvania statute is clearly patterned on 28 U. S. C. § 2244(d)(1), as added by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which was moving through Congress at the same time. The evident purpose of the Pennsylvania act, like AEDPA, was to give criminal judgments a greater degree of finality than the preexisting court-created rules had given them. Compare *Peterkin*, 554 Pa., at 557-588, 722 A. 2d, at 642-643, with *Mayle* v. *Felix*, 545 U. S. __, 125 S. Ct. 2562, 2574, 162 L. Ed. 2d 582, 597 (2005).

The inapplicability of the judicially created "relaxed waiver" rule to this new statutory limitation was so obvious that the *Peterkin* court did not even mention the waiver rule. When a subsequent petitioner made that argument, the Pennsylvania Supreme Court dismissed it in a single paragraph, without dissent. See *Commonwealth* v. *Banks*, 556 Pa. 1, 6, 726 A. 2d 374, 376 (1999).

Given the plain language and evident purpose of the statute, the Court of Appeals' holding that "Bronshtein did not have fair notice," App. to Pet. for Cert. 16a, borders on preposterous. One might well say it was "less than perfectly clear" that the relaxed waiver rule would not apply, see *ibid.*, but *perfect* clarity is not the test.

In the due process context, this Court has held that a defendant lacks fair warning when a change in the law is

" 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.' " *Rogers* v. *Tennessee*, 532 U. S. 451, 462 (2001) (quoting *Bouie* v. *City of Columbia*, 378 U. S. 347, 354 (1964)). This standard is appropriate for the present context as well. When a court changes a rule on its own initiative after the time to comply is past, the defendant lacks fair notice. See *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991). However, when the legislature changes the rule, defendants have fair notice of the plain meaning of the statute from the day of enactment.

"[G]eneral statements of the law are not inherently incapable of giving fair and clear warning . . . ." *United States* v. *Lanier*, 520 U. S. 259, 271 (1997). A case on point is not required to give notice that a statute means what it plainly says. See *ibid.* The statute in the present case set a one-year time limit with certain exceptions, and a blanket exception for capital cases was not among them. That was fair notice that claims not filed within a year might be lost, in capital as well as noncapital cases. While courts sometimes do give statutes a meaning other than their plain one, the mere possibility of such a misinterpretation is insufficient to defeat the plainly expressed will of the people's elected representatives.

III. A narrow definition of "adequate" state default rules undercuts the policies of the exhaustion and deference rules.

The procedural default rule does not exist in a vacuum. It is interwoven with two other rules of habeas corpus law, the long-standing requirement of exhaustion of state remedies and the more recently enacted mandate of deference to state-court decisions on the merits.

Justice Stevens explained the interrelation between exhaustion and procedural default in his dissent in *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 853-854 (1999):

> "In order to protect the integrity of our exhaustion rule, we have also crafted a separate waiver rule, or—as it is now commonly known—the procedural default doctrine. The purpose of this doctrine is to ensure that state prisoners not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so. If we allowed state prisoners to obtain federal review simply by letting the time run on adequate and accessible state remedies and then rushing into the federal system, the comity interests that animate the exhaustion rule could easily be thwarted. We therefore ask in federal habeas cases not only whether an applicant has exhausted his state remedies; we also ask how he has done so. This second inquiry forms the basis for our procedural default doctrine: A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims].' *Darr* v. *Burford*, 339 U. S. 200, 204 (1950). When a prisoner has deprived the state courts of such an opportunity, he has procedurally defaulted his claims and is ineligible for federal habeas relief save a showing of 'cause and prejudice,' *Murray* v. *Carrier*, 477 U. S. 478, 485 (1986), or ' "a fundamental miscarriage of justice" ' *id.*, at 495." (Emphasis in original.)

Although this passage is from a dissent, it was endorsed by the opinion of the Court in *O'Sullivan* itself, see *id.*, at 848, and in *Edwards* v. *Carpenter*, 529 U. S. 446, 453 (2000).

If "adequate" procedural default rules are defined so narrowly that they are the exception rather than the norm, the doctrine will fail in its purpose. Indeed, the facts of the present case are precisely as described by Justice Stevens. Bronshtein deliberately withdrew his initial state petition and let the clearly defined time run before filing another one. If the Court of Appeals is correct in this case, Bronshtein will be completely excused from his intentional failure to *properly* exhaust state

remedies, merely because the Pennsylvania Supreme Court had no occasion to rule that the statute means what it says until two years after its enactment.

After enactment of AEDPA, the procedural default doctrine is not limited to protecting the integrity of the exhaustion rule. Now it also protects the integrity of the cornerstone reform of AEDPA, the deference rule of 28 U. S. C. § 2254(d).

In AEDPA, Congress reaffirmed and strengthened the exhaustion rule by providing that the requirement cannot be inadvertently defaulted by the State. See 28 U. S. C. § 2254(d)(3). The reason that fair presentation of claims to the State courts has such added importance is that the State court decision now has great significance under § 2254(d). See, *e.g.*, *Brown* v. *Payton*, 544 U. S. __, 125 S. Ct. 1432, 1442-1443, 161 L. Ed. 2d 334, 348-349 (2005) (Breyer, J., concurring).

The deference provision, by its terms, only applies "to any claim that was adjudicated on the merits in State court proceedings . . . ." § 2254(d). Without a functioning procedural default rule, a defendant could withhold his claim at the time he was supposed to make it and then submit it late. If the late claim is rejected on procedural grounds, and the federal court considers the state rule "inadequate," he then receives a *de novo* determination in federal court, something Congress has forbidden for those who present their claims properly.

This perverse result is exactly what happened in the present case. If Bronshtein had filed his petition within the statute's plainly stated time limits, the Pennsylvania Supreme Court would have decided it on the merits. If the decision was unfavorable, the federal habeas court would then have been limited to deciding if that court's application of clearly established federal law was reasonable. By sandbagging the State courts, Bronshtein evaded Congress's limitation on federal habeas review. He did, that is, unless this Court reinstates Pennsylvania's clear, reasonable, easily complied-with rule of procedure.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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